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Supreme Court, U.S.
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No. 95-346

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner*,

v.

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF MASSACHUSETTS, FORTY-ONE STATES, AND THE COMMONWEALTH OF PUERTO RICE IN SUPPORT OF PETITIONER

SCOTT HARSHBARGER
Attorney General
of Massachusetts

Of Counsel:
ELENI M. CONSTANTINE
National Association
of Attorneys General
444 N. Capitol Street
Washington, D.C. 20001

DONNA L. PALERMINO*
Assistant Attorney General
One Ashburton Place, Room 1915
Boston, Massachusetts 02108
(617)727-2200
*Counsel of Record

(Additional Counsel on Inside Cover)

36 pp

JEFF SESSIONS
Attorney General
of Alabama

BRUCE M. BOTELHO
Attorney General
of Alaska

GRANT WOODS
Attorney General
of Arizona

WINSTON BRYANT
Attorney General
of Arkansas

DANIEL E. LUNGREN
Attorney General
of California

JOHN M. BAILEY
Chief State's Attorney
of Connecticut

M. JANE BRADY
Attorney General
of Delaware

ROBERT A. BUTTERWORTH
Attorney General
of Florida

MICHAEL J. BOWERS
Attorney General
of Georgia

MARGERY S. BRONSTER
Attorney General
of Hawaii

ALAN G. LANCE
Attorney General
of Idaho

JAMES E. RYAN
Attorney General
of Illinois

PAMELA CARTER
Attorney General
of Indiana

THOMAS J. MILLER
Attorney General
of Iowa

CHRIS GORMAN
Attorney General
of Kentucky

RICHARD P. IEYOUB
Attorney General
of Louisiana

ANDREW KETTERER
Attorney General
of Maine

J. JOSEPH CURRAN, JR.
Attorney General
of Maryland

FRANK J. KELLEY
Attorney General
of Michigan

HUBERT H. HUMPHREY III
Attorney General
of Minnesota

MIKE MOORE
Attorney General
of Mississippi

JOSEPH P. MAZUREK
Attorney General
of Montana

DON STENBERG
Attorney General
of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
Nevada

JEFFREY R. HOWARD
Attorney General
of New Hampshire

DEBORAH T. PORITZ
Attorney General
of New Jersey

TOM UDALL
Attorney General
of New Mexico

MICHAEL F. EASLEY
Attorney General
of North Carolina

HEIDI HEITKAMP
Attorney General
of North Dakota

BETTY D. MONTGOMERY
Attorney General
of Ohio

DREW EDMONDSON
Attorney General
of Oklahoma

THEODORE R. KULONGOSKI
Attorney General
of Oregon

WALTER W. COHEN
Acting Attorney General
of Pennsylvania

PEDRO R. PIERLUISI
Attorney General
of Puerto Rico

JEFFREY B. PINE
Attorney General
of Rhode Island and
Providence Plantations

MARK BARNETT
Attorney General
of South Dakota

DAN MORALES
Attorney General
of Texas

JAN GRAHAM
Attorney General
of Utah

JAMES S. GILMORE, III
Attorney General
of Virginia

CHRISTINE O. GREGOIRE
Attorney General
of Washington

JAMES DOYLE
Attorney General
of Wisconsin

WILLIAM U. HILL
Attorney General
of Wyoming

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The amici curiae Commonwealth of Massachusetts and the states identified on the cover, through their attorneys general, respectfully submit this brief in support of the United States' petition for certiorari.

STATEMENT OF INTEREST

The Court of Appeals barred the civil forfeiture of drug proceeds as a second "punishment" under the Double Jeopardy Clause for defendants previously convicted of drug offenses. Although the decision construed 21 U.S.C. § 881 (a)(6), the states have a strong interest in this case. Many have civil forfeiture statutes patterned after § 881,[1] and those with a different form of statute[2] face double jeopardy challenges

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[1] *E.g., In the Matter of One 1987 Toyota*, 621 A.2d 796, 798 (Del. Super. Ct. 1987) (Delaware statute "modeled closely upon" § 881); *Idaho Dept. of Law Enforcement v. Real Property Located in Mindoka County, Idaho*, No. 20626 (Idaho June 8, 1994) (Idaho statute "virtually identical to" § 881); *Illinois v. Towns*, 269 Ill. App. 3d 907, 915, 646 N.E.2d 1366, 1371, 206 Ill. Dec. 279, 284 (Ill. App. Ct. 1995) (Illinois statute is "patterned after" § 881); *Love v. One 1967 Chevrolet El Camino*, 247 Kan. 469, 473, 799 P.2d 1043, 1047 (Kan. 1990) (Kansas statute "almost identical to" § 881); *Louisiana v. 1979 Cadillac Deville*, 632 So. 2d 1221, 1224 (La. Ct. App. 1994) (Louisiana statute "patterned after" § 881); *South Dakota v. One 1983 Black Toyota Pickup*, 415 N.W.3d 511, 513 n.* (S.D. 1987) (South Dakota statute is "patterned" after § 881).

[2] Some states have adopted new model forfeiture codes, such as the Model Asset Seizure and Forfeiture Act,, *e.g.*, Ark. Code Ann. §§ 5-64-505 to 5-64-509 (Michie 1993); Ga. Code Ann. § 16-13-49 (Supp. 1994); Haw. Rev. Stat. §§ 712A-1 to 712A-20 (Supp. 1992); La. Rev. Stat. Ann. §§ 40: 2601 to 40: 2622 and §§ 32: 1550 to 32: 1553 (Supp. 1995); Or. Rev. Stat. Ann. § 166 (Supp. 1993), or the Commission Reform Act of 1994 drafted by the President's Commission on Model State Drug Laws, *e.g.*, Ariz. Rev. Stat. Ann §§ 13-4301 to 13-4315 (Supp. 1994); Kan. Stat. Ann. §§ 65-4135 to 65-4175 (1992).

relying on the decision below. Although state statutes vary in subject matter and scope, virtually all authorize civil forfeiture of the proceeds of criminal conduct.

Civil forfeiture is an essential tool in the states' efforts to remedy the effects of crime. In particular, "[a]s an integral part of the 'war on drugs,'" civil forfeiture efforts around the country have recaptured millions of dollars in illegal profits that otherwise would have been reinvested in the expansion of the market for the sale of drugs nationwide. *United States v. Stanwood*, 872 F. Supp. 791, 793 (D. Or. 1994). "Taking away the profits of drug crimes is a powerful weapon to cripple drug-trading enterprises." *United States v. All Funds on Deposit*, 801 F. Supp. 984, 989 (E.D.N.Y. 1992). Civil forfeiture also compensates for costs related to the investigation and prosecution of drug offenses and other crimes.[3]

SUMMARY OF ARGUMENT

The issues presented are important. As a result of the decision below, the states face a significant increase in vexatious double jeopardy litigation. Like *$405,089.23*, many actions seek to invalidate civil forfeiture proceedings concluded after a parallel criminal conviction. Others challenge *criminal* prosecutions that follow related civil forfeiture proceedings. In fact, criminal convictions have been reversed on double jeopardy grounds by the Sixth Circuit in *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *petition for cert. pending*, No. 95-345, and by district courts within the Ninth Circuit. Still other suits rely on *$405,089.23* in increasingly novel ways to invalidate "driving under the influence" convictions or criminal convictions of licensed professionals, where there has been a prior administrative license suspension or revocation. The states' need for guidance from this Court is acute.

Moreover, the Ninth Circuit acknowledged that its decision conflicts with *United States v. Tilley*, 18 F.3d 295 (5th Cir.), *cert. denied*, 115 S. Ct. 1574 (1994). It also conflicts with *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994), and *United States v. Carson*, 52 F.3d 1173, 1182-83 (2d Cir. 1995), and conflicts among the district and state courts are proliferating.

Finally, by establishing a categorical rule that *all* civil forfeitures of proceeds impose "punishment," without assessing the particular forfeiture at issue here, and by ignoring the remedial purposes underlying proceeds forfeiture, the decision conflicts with *United States v. Halper*, 490 U.S. 435 (1989), and *Austin v. United States*, 113 S. Ct. 2801 (1993), and with the fundamental principle underlying *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989).

REASONS FOR GRANTING REVIEW

I. THE DECISION BELOW HAS HAD A SEVERE CHILLING EFFECT ON THE STATES' ENFORCEMENT OF THEIR CIVIL FORFEITURE AND CRIMINAL LAWS.

The Court of Appeals held that because civil forfeiture of proceeds constitutes "punishment" under the Double Jeopardy

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[3] Funds recovered from forfeited property are often earmarked for expenditure on costs related to investigating and prosecuting such criminal activity. *E.g.*, Ariz. Rev. Stat. Ann. §§ 13-2314.01, 13-2314.03 and 13-4315(c); Fla. Stat. ch. 932.7055(3) - (6); La. Rev. Stat. ch. 40, § 2616 (1994); 15 Me. Rev. Stat. Ann. § 5822 (4)(A) (1991)(Supp.); Mich. Comp. Laws § 333.7524 and § 610.4708 (1994); Minn. Stat. § 609.5315, subd.. 4, 5 (1994); Mont. Code Ann. § 44-12-206 (1994); N.H. Rev. Stat. Ann. § 318-B: 17-b, 17-c (1994); N.J. Rev. Stat. § 2C: 64-6 (1994); 1989 Or. Laws 791, § 2 (11); 42 Pa. Cons. Stat. Ann. § 6801 (1995); R.I. Gen. Laws § 21-28-5.04(3) (1994); Utah Code Ann. § 58-37-13(3) and 58-37-15(j) (1994).

Clause, it is barred where there has been a prior criminal prosecution. 33 F.3d 1210, 1218-22. The seven circuit judges dissenting from denial of rehearing en banc observed that "[g]iven the national importance of the civil forfeiture program and the damage that can be wrought from getting it wrong," further review of the decision is of critical importance. 56 F.3d 41, 43. Failing to review the decision "lets stand a decision that 'could free hundreds of drug dealers across the western United States.'" *Id.* at 42 (citation omitted).

For the states, these concerns have become a reality. Nationwide the states face an influx of new double jeopardy challenges where *$405,089.23* is cited as a basis for invalidating not only civil forfeiture proceedings[4] but also criminal prosecutions.[5] Some offenders have relied on *$405,089.23* to win reversal of their convictions already,[6] in the state trial courts,[7] district courts within the Ninth Circuit,[8] and the Sixth Circuit in *United States v. Ursery*, 59 F.3d 568 (6th

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[4] *E.g., Arizona v. Leyva*, No. CV 90-03498 (Ariz. Ct. App. Sept. 12, 1995) (invalidating civil forfeiture judgment; motion for reconsideration pending); *Nevada v. 1984 Ford F-250*, No. CV 1570691 (7th Dist. Ct.) (pending motion for relief from civil forfeiture judgment).

[5] *E.g., Rice v. Arizona*, No. 2CA-SA 94-0133 1995 WL 507572 (Ariz. Ct. App. Aug. 29, 1995) (seeking dismissal of drug charges); *Kansas v. Johnson*, No. 95-CR-22 (Kan. Dist. Ct.) (challenging conviction for methamphetamine trafficking); *Massachusetts v. Penta*, No. 87-3109 and 87-3110 (Middlesex Super. Ct.) (challenging conviction for cocaine trafficking); *Wright v. Nevada*, No. 25632 (Nev.) (challenging conviction for manufacturing marijuana); *Gordon v. Eighth Judicial District Court of Nevada*, Case No. 26722 (Nev.) (challenging court's authority to proceed on criminal racketeering charges); *Virginia v. Ferguson*, No. 5786, 5787 (Va. Cir. Ct.) (challenging conviction for possession of cocaine with intent to distribute).

[6] These cases represent not merely an application but an expansion of *$405,089.23*, which ignores this Court's careful distinction, in *Kurth Ranch*, between the issue of whether a civil sanction should be barred under the Double Jeopardy Clause and "whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1947 n. 21 (1994).

[7] *E.g., Massachusetts v. Viveira*, No. 34516-20 (Bristol Super. Ct. May 30, 1995) (following the "sound reasoning" of *Austin* and *$405,089.23*).

[8] *E.g., Oakes v. United States*, 872 F. Supp. 817, 826 (E.D. Wash. 1994) (granting habeas relief to a drug offender who was to have served a mandatory minimum sentence of five years for manufacturing marijuana). *United States v. McCaslin*, 863 F. Supp. 1299, 1307 (W.D. Wash. 1994), decided almost contemporaneously with *$405,089.23*, similarly vacated on double jeopardy grounds the conviction of a drug offender who had served his fifteen months prison sentence but had not completed his three years of supervised release. Numerous other cases have indicated in dicta that under *$405,089.23* offenders generally are entitled to such relief, although the particular case was factually distinguishable because (1) the offense underlying the forfeiture differed from the offense of which defendant was convicted, *United States v. Shorb*, 876 F. Supp. 1183, 1186-87 (D. Or. 1995); (2) the criminal defendant had failed to assert a claim to the seized property and thus jeopardy did not attach in the civil forfeiture proceeding, *United States v. Nakamoto*, 876 F. Supp. 235, 239 (D. Haw. 1995); *United States v. Walsh*, 873 F. Supp. 334 (D. Ariz. 1994); or (3) as in *$405,089.23* jeopardy attached in the civil proceeding later than in the criminal proceeding, *United States v. Branum*, 872 F. Supp. 801, 803 (D. Or. 1994); *United States v. Kemmish*, 869 F. Supp. 803 (S.D. Calif. 1994).

Cir. 1995), *petition for cert. pending*, No. 95-345.[9] Because new state actions challenging state forfeiture statutes are raising federal constitutional challenges, federal court decisions are of particular concern to the states.

In the state courts, the reasoning of the decision below has been applied in quite different contexts, adding to the proliferation of new double jeopardy cases and threatening disastrous results for law enforcement. Some actions have sought to invalidate "driving under the influence" convictions that follow administrative license revocations.[10] Others have sought to reverse criminal convictions of licensed professionals previously subjected to sanctions by the civil licensing

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[9] The *amici* states understand that the United States will also be seeking certiorari review of *Ursery*, which the amici states strongly support. Most of the arguments stated herein also support granting certiorari in *Ursery*.

[10] For examples of cases in support of the prosecution, *see Snow v. Superior Court of Arizona*, Case No. 1 CA-SA 950102 1995 WL 332263 (Ariz. Ct. App. June 6, 1995); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630 (Cal. Ct. App. 1995); *Delaware v. Ford*, Case No. Cr.A# 94-100075 (Del. Ct. Com. Pl. Feb., 13, 1995); *Davidson v. MacKinnon*, 656 So. 2d 223 (Fla. Dist. Ct. App. 1995); *Hawaii v. Higa*, 79 Haw. 1, 897 P.2d 928 (Haw. 1995); *Maine v. Savard*, 659 A.2d 1265 (Me. 1995); *Minnesota v. Hanson*, 532 N.W.2d 589 (Minn. Ct. App. 1995); *Nebraska v. Young*, 3 Neb. App. 539, 530 N.W.2d 269 (Neb. Ct. App. 1995); *New Hampshire v. Cassady*, 662 A.2d 955 (N.H. 1994); *Ohio v. Miller*, No. 95CA8 1995 WL 505939 (Ohio Ct. App. May 12, 1995); *Cleveland v. Nutter*, 68 Ohio Misc. 2d 46, 646 N.E.2d 1209 (Ohio Mun. Ct. 1995); *Cleveland v. Miller*, 68 Ohio Misc. 2d 52, 646 N.E.2d 1213 (Ohio Mun. Ct. 1995); *Hubbard v. Texas*, 903 S.W. 2d 892 (Tex. Ct. App. 1995). For examples of cases supporting the defense *see Connecticut v. Hickham*, No. MV94-618025 1995 WL 243352 (Conn. Super. Ct. April 20, 1995); *Florida v. Reilly*, Case No. 94-6661MM10 (Broward Cnty. 1994); *Ohio v. Gustafson*, Case No. 94 C.A. 232 1995 WL 387619 (Ohio Ct. App. June 27, 1995) .

authority.[11] While in some states, these unusual applications of *$405,089.23* have had little success, in others, such novel applications have been successful at the trial court or lower appellate court level.[12] Given the array of remedies used by the states to address the deleterious effects of criminal conduct, the potential breadth of *$405,089.23's* application is staggering.[13]

In the aftermath of *$405,089.23*, state attorneys around the country are questioning how or whether to proceed with parallel criminal prosecutions and civil forfeiture proceedings. The Ninth Circuit approach -- requiring prosecutors "to choose whether to include a criminal forfeiture count in the indictment" or "to pursue only the civil forfeiture action," 33 F.3d 1210, 1222 -- offers no acceptable alternative for timely, full and fair law enforcement for the many states lacking a criminal forfeiture statute. The government is faced with the Hobson's choice of forgoing either a typical *in rem* civil forfeiture

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[11] *Schillerstrom v. Arizona*, 885 P.2d 156 (Ariz. 1994); *Loui v. Board of Medical Examiners*, 889 P.2d 705 (Haw. 1995); *Alexander v. Louisiana Board of Medical Examiners*, 644 So.2d 328 (La. Ct. App. 1994). *See also Bae v. Shalala*, 44 F.3d 489 (7th Cir. 1995) (double jeopardy challenge where lawyer disbarred); *Ayars v. New Jersey Department of Corrections*, 597 A.2d 1084 (N.J. Super. Ct. 1991) (double jeopardy challenge by prison guard claiming that previous prosecution for tax evasion barred state from removing him from his position).

[12] See cases cited in note 11.

[13] Other challenges have relied on *$405,089.23* as a basis for invalidating criminal convictions following loss of good time or disciplinary transfer. *E.g., United States v. Brown*, No. 94-30271 (9th Cir. June 20, 1995); *Garrity v. Fiedler*, 41 F.3d 1150, 1151-53 (7th Cir. 1994); *Connecticut v. Walker*, 646 A.2d 209, (Ct. App.), *certification denied*, 648 A.2d 159 (Conn. 1994); *Maine v. O'Connor*, No. CR-95-89 (Knox Sup. Ct. July 18, 1995); *Wild v. Virginia*, 446 S.E.2d 626, 627 (Va. Ct. App. 1994).

proceeding or a criminal prosecution. Even in states with criminal forfeiture statues, the indictment and trial of the criminal offense could be complicated and often delayed by the simultaneous adjudication of the defendant's and the government's interests in the forfeited property, particularly if there are third-parties claiming to be innocent owners.[14]

In contrast, the states' pre-existing and widespread practice of allowing parallel criminal and civil *in rem* proceedings provides a single forum for adjudicating all claims to the seized property -- including those of both criminal suspects and "innocent owners" -- and distinguishing nominal from real interests in property. A civil proceeding offers procedural mechanisms not available in criminal proceedings -- such as liberal discovery, motions to dismiss, and motions for judgment on the pleadings or summary judgment -- and a court system with the experience and expertise suited to the full and efficient adjudication of civil property rights.[15]

Despite these advantages, state prosecutors nationwide are reluctant to go forward with parallel civil forfeiture and criminal proceedings and thereby risk invalidation of criminal convictions, as in *Ursery*. Other prosecutors, fearing that *$405.089.23* may lead to the invalidation of driving under the influence convictions, have counselled police officers to refrain from taking driver's licenses away from suspects. Because the decision below has had such a chilling effect on enforcement of

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[14] In addition, if seizure of assets is delayed -- because, for example, they have been hidden or transferred -- prosecutors would have to either delay the criminal trial and forgo forfeiture entirely.

[15] Moreover, the states support the United States' argument that civil forfeiture and the related criminal prosecution are part of "the same proceeding" for Double Jeopardy purposes.

state criminal and civil forfeiture law, the states seek guidance from this Court.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THE DECISIONS OF THREE OTHER CIRCUITS.

The Ninth Circuit acknowledged that its holding squarely conflicts with *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir.), *cert. denied*, 115 S. Ct. 1574 (1994), that the civil forfeiture of proceeds did not constitute punishment under the Double Jeopardy Clause. In addition, the decision conflicts with *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (following *Tilley* in holding that an order requiring a convicted defendant to disgorge the profits of illegal securities trading did not constitute punishment under the Double Jeopardy Clause), and *United States v. Carson*, 52 F.3d 1173, 1182-83 (2d Cir. 1995) (same).[16]

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[16] Two other circuits have also refused to take the Ninth Circuit's extreme categorical approach to defining "punishment." As the decision below acknowledged, the Fourth Circuit, in a pre-*Austin* case, held that civil forfeiture of proceeds was not punishment under the Double Jeopardy Clause. *United States v. Borromeo*, 995 F.2d 23, 27 (4th Cir. 1993). In a subsequent appeal in *United States v. Borromeo* (*Borromeo II*), 1 F.3d 219, 221 (4th Cir. 1993), the Fourth Circuit remanded the case for a particularized determination of whether the forfeiture of property derived from criminal proceeds was excessive under *Austin*. Likewise, the Eighth Circuit, in considering whether a criminal forfeiture was an "excessive fine" under the Eighth Amendment, acknowledged that the forfeiture of proceeds is never punishment. *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994). On the other hand, as noted *supra*, the Ninth Circuit's approach was followed and expanded by the Sixth Circuit, which held that, at least in the real estate forfeiture context, civil forfeiture did constitute "punishment" under the Double Jeopardy Clause, and thus the later-occurring criminal conviction was invalidated as an unconstitutional second punishment. *United States v. Ursery*, No. 94-1127 (6th Cir. July 13, 1995), *petition for cert. pending*, No. 95-345.

This circuit split, moreover, is creating further conflicts among the district courts and state courts. As noted above, within the Ninth Circuit, district courts have applied *$405,089.23* so as to invalidate not only civil forfeiture proceedings but also criminal convictions.[17] Other district courts, however, have rejected the approach of *$405,089.23*, often following *Tilley* and *Bilzerian*.[18] *$405,089.23* has also generated confusion among the state courts -- and even conflicts

[17] *See* p. 5-6 & nn. 7-8 *supra*.

[18] *E.g., United States v. Pipkin*, Cr. No. H-92-293 (S.D. Tex. May 17, 1995) (holding that the forfeiture of proceeds is not punitive and thus did not violate the Double Jeopardy Clause); *United States v. Land*, 1995 WL 296391 (E.D. La. May 15, 1995) (same); *United States v. Contents of Account Number 383-1637-4*, No. 94 Civ. 5114 (D.N.J. April 13, 1995) (refusing to follow *$405.089.23*); *Biereger v. United States*, No 94 Civ. 2359 (D.N.J. Jan. 18, 1995) (holding that forfeiture of drug proceeds is remedial, following *Tilley*, and rejecting *$405,089.23)*; *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D.Va. 1994) (holding that forfeiture of drug proceeds is remedial). *See also Crowder v. U.S.*, 874 F. Supp. 700, 704 (M.D.N.C. 1994) (although disposing of the case on other grounds, concluding that the Fourth Circuit would follow the Fifth and D.C. Circuits rather than the Ninth Circuit on the issue of whether civil forfeiture constituted punishment under the Double Jeopardy Clause). *See also United States v. Fifty Thousand Dollars in United States Currency*, No. 93C3874 1994 US Dist. WL 75145 (N.D. Ill. March, 8, 1994) (distinguishing *$405,089.23* and holding that *Austin* did not affect the traditional presumption that forfeiture of items involved in customs violations is wholly remedial.)

within the same state[19] -- considering federal constitutional challenges to their own forfeiture statutes.

III. THE NINTH CIRCUIT DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Ninth Circuit explicitly relied on *Austin v. United States*, 113 S. Ct. 2801 (1993) and *United States v. Halper*, 490 U.S. 435 (1989) in holding that civil forfeiture after a criminal conviction constitutes punishment under the Double Jeopardy Clause. According to the decision, *Austin* "explicitly refused to apply . . . a case-by-case approach to determining whether a forfeiture constitutes 'punishment,'" and instead "look[ed] to the requirements of the forfeiture *statute* as a whole," adopting what the Ninth Circuit describes as a "categorical approach to punishment determinations in the forfeiture context." 33 F.3d 1210, 1220. The decision holds that *Austin* thus created "a

[19] Compare *In re 2120 S. 4th Ave.*, 177 Ariz. 599, 603, 870 P. 2d 417, 421 (Ariz. Ct. App. 1994) (Arizona statute is remedial and not punitive) with *Arizona v. Leyva* No. CV 90-03498 (Ariz. Ct. App. Sept. 12, 1995) (money judgment for amount of gain acquired through racketeering under Arizona stature is punitive; adopts reasoning of *$405.089.23*; motion for reconsideration pending), *Fant v. Texas,*, 881 S.W.2d 830, 833-34 (Tex. Ct. App. 1994) (Texas forfeiture law is punitive and triggers double jeopardy protection) with *Johnson v. Texas*, 882 S.W. 2d 17, 19-20 (Tex. Ct. App. 1994) (Texas law is primarily remedial and Double Jeopardy Clause is not implicated unless the forfeiture is "overwhelmingly disproportionate to the damage appellant caused"). Compare *Illinois v. Towns*, 269 Ill. App. 3d 907, 911, 646 N.E.2d 1366, 1368, 206 Ill. Dec. 279, 281 (Ill. App. Ct. 1995) (distinguishing *$405,089.23* on the facts but explicitly adopting its reasoning for future cases), with *Hines v. Iadarola*, 164 Misc. 2d 204, 623 N.Y.S.2d 999 (N.Y. Super. Ct. 1995) (rejecting *$405,089.23* and following *Tilley* in holding that proceeds forfeiture is not punishment under the Double Jeopardy Clause).

strong presumption that any forfeiture statute does not serve *solely* a remedial purpose." *Id.* at 1221. In fact, this approach to the meaning of punishment under the Double Jeopardy Clause conflicts with *Halper, Austin,* and *Department of Revenue of Montana v. Kurth Ranch,* 114 S. Ct. 1937 (1994).

A. The Court of Appeals' Adoption of an Overbroad Categorical Approach Conflicts With *Halper* and *Austin*.

The Double Jeopardy Clause prohibits three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and a second punishment for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In *United States v. Halper*, 490 U.S. 435 (1989), this Court for the first time considered whether a penalty imposed in a civil proceeding may constitute a second "punishment" under the Double Jeopardy Clause. *Halper* announced "a rule for the rare case" where a civil penalty "may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment" within the meaning of the Double Jeopardy Clause. 490 U.S. 435, 449, 441-42.

This determination whether a civil sanction constitutes punishment "requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve," the Court noted, reasoning:

> This constitutional provision is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.

Id. at 447, 448. The Court thus established a flexible "rule . . . of reason" allowing relief only where the civil penalty

bears "no rational relation to the goal of compensating the Government for its loss," and thus "*in fact* constitutes a second punishment." *Id.* at 449-50. Consequently, the Court concluded "recourse to statutory language structure, and intent . . . is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." 490 U.S. at 447.

Contrary to the Ninth Circuit decision below, *Austin* did not reverse the *Halper* approach by adopting a categorical approach to punishment or by creating a strong presumption about the purposes of all forfeiture statutes. In *Austin,* the Court recognized the individualized nature of the *Halper* inquiry under the Double Jeopardy Clause, 113 S. Ct. 2801, 2812 n. 14, but addressed an entirely different, threshold constitutional issue -- whether 21 U.S.C. §§ 881 (a) (4) and (a)(7) qualified as a "fine" under the Excessive Fines Clause of the Eighth Amendment. 113 S. Ct. 2801, 2803. Since that amendment only prohibits *excessive* fines, the inquiry was understood to be only the first step of the constitutional analysis. The Court noted that at this threshold stage:

> it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures [under the statutes at issue] or only to those that cannot be characterized as purely remedial. The clause prohibits only the imposition of "excessive" fines, *and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.*

113 S. Ct. 2801, 2812 n.14 (emphasis added). The Court thus remanded for the second stage of the constitutional inquiry: whether the particular "fine" at issue was "excessive," or

alternatively, "purely remedial" under the Eighth Amendment. *Id.* at 2812 n.14.[20]

Despite *Halper*'s clear command to evaluate double jeopardy claims on their facts, while noting that only "the rare case" will fail the test, the Ninth Circuit explicitly refused to apply a particularized analysis here. By failing to make a particularized assessment of the proceeds forfeiture here and relying instead on statutory language, structure and intent, the decision conflicts with *Halper*. The Ninth Circuit also erred in applying in a double jeopardy context the *Austin* threshold inquiry under the Eighth Amendment -- which has never been applied by this Court to double jeopardy challenges. In so doing, the Ninth Circuit invalidated a sanction which, as discussed *infra*, "*serves purely remedial purposes*" and under *Austin* should not have been invalidated because it "*cannot be considered 'excessive' in any event.*" The decision thus conflicts with both *Halper* and *Austin*.[21]

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[20] Any doubt about whether the *Halper*-style particularized analysis of double jeopardy claims survived *Austin* was dispelled in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), which upheld a Double Jeopardy challenge against a Montana drug tax. Although recognizing that the *Halper* test was ill-suited to the peculiarities of tax statutes -- which serve to raise revenue or deter conduct -- the Court reaffirmed *Halper*'s general understanding that double jeopardy protections are "intrinsically personal" and that therefore only "'the character of the actual sanctions' can substantiate a possible double jeopardy violation." 114 S. Ct. 1937, 1946 (citation omitted). Thus, the Ninth Circuit errs in suggesting that *Kurth Ranch* "applied *Austin*'s categorical approach." 56 F.3d 41, 42 .

[21] The decision also conflicts with the decisions of at least three other circuits that have engaged at least in the case-by-case inquiry of *Halper*. *See Tilley*, 18 F.3d 295, 298-99 (stating that under *Halper*, the court must consider whether "if, *in this particular case*, the amount of the proceeds forfeited was so great that it bore no rational relation to the

B. The Decision Below Articulated a Much Broader Definition of Punishment Than That Set Forth in the Holding of *Halper*.

According to Ninth Circuit, *Halper* held that "a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose." 33 F.3d 1210, 1219. The court relied on the following language from *Halper*: "[A] civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* The Ninth Circuit, however, omitted the very next sentence, which was *Halper's* true holding:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.

490 U.S. at 448-49 (emphasis added). That is, a second sanction is invalid if it can "*only*" be characterized as a deterrent or retribution and has no remedial function. This definition of punishment was reiterated in this Court's

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costs incurred by the government.") (emphasis added); *United States v. Hudson*, 14 F.3d 536, 543 (10th Cir. 1994) (remanding a Double Jeopardy challenge for determination of whether the fines imposed by the Office of the Comptroller of Currency "in fact" were a remedy for the government's injury); *United States v. Barnette*, 10 F.3d 1553, 1559-60 (11th Cir. 1994) (comparing the size of the restitution order with the government's actual loss resulting from the defendant's conduct.)

post-*Austin* decision squarely raising the issue of "punishment" under the Double Jeopardy Clause. *See Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) (quoting only the holding of *Halper* without reference to the dicta upon which the Ninth Circuit relies).[22]

The Ninth Circuit justifies its rejection of *Halper's* true holding by noting that *Austin* took the same approach. 33 F.3d at 1210, 1219. Because *Austin* posed a different constitutional question, it does not support the Ninth Circuit's departure from *Halper* and *Kurth Ranch* or its award of a sweeping remedy -- barring the civil forfeiture action entirely -- beyond that ever authorized by this Court.

IV. Civil Forfeiture of Proceeds Does Not Constitute Punishment Under the Double Jeopardy Clause.

A. *Austin* Recognized That Certain Civil Forfeitures Are Generally Remedial.

Although the Ninth Circuit interpreted *Austin* as creating a strong presumption that all civil forfeitures are punitive in nature, *Austin* actually acknowledged the opposite: some types

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[22] The Court stated: "[in *Halper*] we held that 'a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.'" *Kurth Ranch*, 114 S. Ct. 1937, 1945 (citation omitted). *Cf. Id.* at 1952 (Rehnquist, C.J., concurring) (inquiring whether a sanction "can only be explained as serving a punitive purpose"); *id.* at 1953 (O'Connor, J., concurring) (examining "the extent [to which] the [civil] sanction serves only the purposes of retribution and deterrence as opposed to furthering any non-punitive objective").

of civil forfeiture are remedial and thus fall outside of the Double Jeopardy Clause. The Court cited the forfeitures at issue in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (contraband firearms) and *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (undeclared imported merchandise) as examples of "cases where the forfeiture could properly be characterized as remedial." 113 S. Ct. 2801, 2805 n.4. In these cases, the Court acknowledged, "[t]he Double Jeopardy Clause has been held not to apply." *Id.* The forfeiture of contraband guns in *89 Firearms*, the Court reasoned, "may be characterized as remedial because it removes dangerous or illegal items from society." 113 S. Ct. 2801, 2811. The forfeiture of undeclared merchandise in *One Lot Emerald Cut Stones* was upheld, the Court noted, because it represented "a reasonable form of liquidated damages" to compensate the government for the costs incurred in investigating and prosecuting the case. *Id.*

The civil forfeitures upheld in *89 Firearms* and *One Lot Emerald Stones* not only survived *Austin* but also illustrate at least some of the types of civil forfeiture that generally do not qualify as "punishment" and require no further constitutional scrutiny. While not suggesting that its list of remedial forfeitures was exhaustive, *Austin* did establish that at least if the civil forfeitures remove dangerous or illegal items from society or serve as a reasonable form of liquidated damages for the government's costs, they are remedial and therefore are not "punishment" for purposes of the Double Jeopardy Clause.

B. Forfeiture of Criminal Proceeds Is Remedial and Beyond the Scope of the Double Jeopardy Clause.

Forfeiture of illegal proceeds resembles forfeiture of contraband in one important respect -- both remove dangerous items from society. Allowing large sums of money to remain

in the hands of drug dealers poses an immediate public safety risk because the currency generally is used to fund future purchases of illegal drugs for resale in future drug transactions. On a national scale, removing drug proceeds from drug offenders inhibits the expansion of the market for illegal drugs and thereby eliminates a serious threat to public safety. The forfeiture of proceeds thus may be characterized as "remedial" under *Austin* because it "removes dangerous . . . items from society." 113 S. Ct. 2801, 2811.[23]

Proceeds forfeiture also resembles the forfeiture of contraband in another way: in both cases the offender has no lawful right to the property. Since drug proceeds are obtained through illegal drug trafficking, the drug offender has no valid property interest in them. This Court's ruling in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) (upholding a civil forfeiture under the proceeds forfeiture provision of the Continuing Criminal Enterprise statute) is premised on lack of any property right: although the proceeds in *Caplin* were intended to pay for the defendant's attorney, the Court found that a criminal defendant "has no Sixth Amendment right to spend another person's money for attorney's fees." *Id.* at 626. Drug proceeds, the Court reasoned, resemble funds that a robbery suspect stole from a bank: in both cases, "[t]he money, though in [the defendant's] possession, is not rightfully his" and the government thus does not violate his rights if it seizes the proceeds. *Id. Cf. Rex Trailer Co. v. United States*, 350 U.S. 148, 153 n. 6 (1955) (characterizing illegal proceeds as "unjust enrichment" and "unfair gain.")

If a drug trafficker has no right to use drug proceeds for attorney's fees, it is because, like a bank robber, he has no right

[23] The amici states also support the argument that instrumentality forfeitures, such as that invalidated in *Ursery*, are also remedial and thus not punishment under the Double Jeopardy Clause.

to the money in the first place. The proceeds of drug transactions are not the legitimate property of the offender, and he thus has no reasonable expectation that the law will protect, or even allow, his continued possession of them. When the government seizes illegal drug proceeds, therefore, it is hardly punishing the offender, since it is not depriving him of any protected property interests. Consequently, the forfeiture of illegal drug proceeds, instead of punishing the forfeiting party, merely returns him to the position he enjoyed before his illegal activities began.[24]

Drugs are contraband and clearly forfeitable. Drug proceeds are acquired by illegally selling this contraband. The only difference between contraband drugs and drug proceeds is an intervening illegal event. Accordingly, just as a defendant deprived of contraband in a civil forfeiture proceeding does not suffer "punishment,"[25] the forfeiture of proceeds does not constitute "punishment" under the Double Jeopardy Clause. The contrary position, adopted by the decision below, leads to the absurd result that a defendant who possesses contraband

[24] *See U.S. v. Tilley*, 18 F.3d 295, 300; *SEC v. Bilzerian*, 29 F.3d 689, 696 (because the disgorgement order required forfeiture of no more than "ill-gotten gains," the order was remedial in nature and beyond the scope of the Double Jeopardy Clause.); *see also United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994) ("Forfeiture of proceeds cannot be considered punishment, . . . since it simply parts the owner from the fruits of the criminal activity.").

[25] The forfeiture of drug proceeds also will always be directly proportional to the amount of drugs sold. *Tilley*, 18 F. 3d 295, 300. They thus will always have a direct relationship to the underlying drug offense. *See Austin*, 113 S. Ct. 2801, 2815 (Scalia, J., concurring). In addition, as in *One Lot Emerald Cut Stones*, proceeds may often qualify as "a reasonable form of liquidated damages" for the costs of investigation and prosecution. *E.g., Tilley*, 18 F. 3d 295, 300.

may be subjected to both criminal punishment and civil forfeiture but by engaging in the further illegal sale of the contraband, he has put himself beyond the scope of the civil forfeiture laws.

CONCLUSION

The petition for certiorari should be granted.

SCOTT HARSHBARGER
Attorney General of Massachusetts

DONNA PALERMINO*
Assistant Attorney General
1 Ashburton Place, Rm 2019
Boston, Massachusetts 02108
(617) 727-2200
* *Counsel of Record*

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